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No. 539.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOSEPH RALPH BURTON, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF FOR UNITED STATES UPON CONSTITUTIONALITY OF SECTION 1782, REVISED STATUTES.

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It is fundamental that this is a government of law, that no one is above the law, and that the Constitution and the laws and treaties made in pursuance thereof are the supreme law of the land.

The powers delegated to the Federal Government are vested by the Constitution in three coordinate departments—the legislative, executive, and judicial. Each of these departments is in some respects independent, in others dependent upon the others. But however independent they may be of each other, they are all subject to the Constitution and the laws enacted in pursuance thereof.

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No department of the Government can usurp the powers of the others or delegate its own powers. But this does not mean that they are entirely beyond the control of each other.

The judicial department, in the exercise of its judicial power, may control the action of the executive and legislative branches of the Government. It can compel the Executive to do his duty and restrain him from unlawful acts. It can nullify the legislation of Congress and prevent its unconstitutional oppression of the individual.

The executive department is called upon to execute the law of the land as well upon members of the legislative and judicial branches as upon all others within the jurisdiction of the United States.

All legislative powers granted by the Constitution are vested in Congress, which must make the law for all departments of the Government, as well as for individuals. In enacting legislation, whatever branch of the Government it may affect, Congress is exercising legislative power merely, and the only requirement is that such legislation be in accordance with the Constitution.

The power to make all laws which shall be necessary and proper to carry into execution the powers delegated to the Federal Government was expressly conferred upon Congress. (Art. I, sec. 8.)

Congress is authorized by the Constitution to establish post-offices and post-roads, raise and support armies, provide and maintain a navy, etc. (Art. I, sec. 8.)

In order to carry into execution such powers, Congress has established the Executive departments.

The administration of those departments belongs to the executive branch of the Government; but Congress must pass all laws necessary for that purpose.

Section 1782, Revised Statutes, is such a law. It is passed solely for the purpose of securing the due administration of the Executive departments, branches, and bureaus of the Government. It is not intended to interfere with the constitutional rights and duties of members of Congress, but to prevent members of the legislative branch of the Government, among others holding relations of trust and confidence with the United States, from interfering with the executive branch in the performance of its duties.

Members of Congress have no absolute right, because of their official position, to appear before any Executive department or bureau of the Government for the purpose of influencing official action, much less to appear for hire, against the Government, in relation to a matter in which the United States is interested. Their rights in the premises are, in law, only those that pertain to them as private persons, and Congress could, if it saw fit, forbid any individual whatsoever from appearing for hire before any department of the Government in such a case in order to secure a better administration of its affairs.

The plenary authority of Congress to protect the Executive departments was asserted in *Public Clearing House* v. *Coyne* (194 U. S., 497), where it was held that in case of conflict the rights of the individual must give

way to the rights of the public. That case related particularly to the postal establishment and the issuance of a fraud-order, and held that such an order constituted due process of law, and that all letters, etc., of the individual offending might be excluded from the mails.

When a claim is before an Executive department of the Government it calls for executive action alone, and Senators or Representatives have no constitutional right to interfere. When such a claim is before Congress it calls for legislative action, and then their constitutional powers and duties come into play.

Bearing in mind that under our system no member of the Government is above the law—a fact which, so far as members of Congress are concerned, is distinctly recognized in the provision of the Constitution excepting from their privilege to be free from arrest during the sessions of Congress cases of treason, felony, and breach of the peace; that Congress must make the law for all the departments of the Government; and that the statute in question is passed in execution of powers delegated to the Federal Government, and, so far from being inconsistent with the Constitution, is intended to preserve the rightful independence of the executive branch of the Government—it is plain that the statute is constitutional.

In what has been said we have assumed that the provisions disqualifying any person convicted of offending against the statute from thereafter holding any office of honor, trust, or profit under the Government of the United States does not refer to the office of

members of Congress. The reasons for this view are set out in the Government's original brief (pp. 59–62). Members of Congress are members *of* the Government not officers *under* the Government. In addition to the authorities cited in the original brief on this point, attention is called to 17 Opin. A. G. 419, and to section 1786, Revised Statutes, which latter section shows that Congress had in mind the fact that a member thereof could only be removed from office in the manner provided in the Constitution.

The court's attention is especially directed to *Ex parte Curtis* (106 U. S., 371), where a somewhat similar statute was construed, and in which many others of like nature, some of which related to members of Congress and judges of the courts of the United States, were referred to. In that case the court said (p. 373):

> The evident purpose of Congress in all this class of legislation has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the scope of legislative power.

An adverse decision as to section 1782 would also strike down section 11 of the Civil-Service Act (22 Stat., 403) forbidding Senators and Representatives, judges, and other officers and employees of the Government from soliciting or receiving political contributions.

If this were a statute abridging one's civil or political rights and privileges because of his official position a different question would be presented.

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In *Louthan* v. *The Commonwealth*, 79 Va., 196, the Supreme Court of Appeals of Virginia held that an act of that State which prohibited the active participation in politics of certain State officials, including judges, was an unconstitutional interference with the rights of the citizen. The *Curtis* case was referred to and distinguished.

On the other hand, in *United States* v. *Newton*, 20 D.C., 226, the Supreme Court of the District of Columbia held that section 12 of the Civil-Service Act, which prohibits persons from soliciting or receiving political contributions in any room or building officially occupied by any United States officer or employee, etc., applied to private citizens as well as officials, and was not an unconstitutional abridgment of the citizen's right of speech and action, the Government having a right to prescribe rules of conduct not only for officers and employees but for all persons visiting such places.

While it is not necessary to do so in this case, we may go further and assert that Congress can not only forbid interference by its members with the executive and judicial branches of the Government, but can regulate the conduct of Senators and Representatives in their official capacity; that is to say, it may forbid them, under penalties, from improperly and corruptly exercising their constitutional rights and privileges. This Congress has attempted to do in section 1781, Revised Statutes, which, among other things, prohibits a member of Congress from receiving any valuable consideration for his attention to, services,

action, vote, or decision on any matter brought before him in his official capacity.

Unless Congress can define and punish offenses committed by Senators and Representatives in their official capacity, the Government is absolutely at the mercy of corrupt members, for no other body can. That Congress can do so, arises from the fact that all legislative power conferred upon the Federal Government is vested in it. From the foundation of the Government this has been held to include the power to enact penal legislation, such legislation being necessary and proper to carry into execution the powers delegated.

United States v. *Coombs*, 12 Pet., 72, 78.
United States v. *Fox*, 95 U. S., 670.
Frisbie v. *United States*, 157 U. S., 166.

The basic principle underlying this whole question is, therefore, that the legislative power granted by the Constitution to Congress includes the power to define and punish offenses against the United States, and that this power is unlimited save by the provisions of the Constitution, and extends to all departments and officers of the Government, as well as individuals.

The only provisions of the Constitution which are referred to as limiting the power of Congress in this respect are those as to the qualifications of members, as to the right of each House to expel a member, and as to the right to compel the attendance of absent members.

It is manifest that none of those provisions have the effect suggested. The Constitution, in the provision as

to the privilege of members from arrest during the session of Congress, recognizes that even during its sessions the constitutional right of each House to compel their attendance may be interfered with by reason of their committing crime. The provisions as to the qualifications of the members of each House have no reference to crime, which, so far as it may disqualify them in a moral or ethical sense, is to be dealt with by each House under its power to expel. So the provision that each House may determine the rules of its proceedings, and punish its members for disorderly behavior, manifestly has reference only to maintaining proper decorum during their proceedings.

There is nothing, therefore, in the provisions referred to which supports the view that the legislative power granted to Congress does not include the definition and punishment of crimes committed by its members in their official capacity. As already said, the principle of the separation of the powers of Government which pervades our system implies nothing more than that the one branch shall not delegate its power to any other branch or entrench upon the latter's jurisdiction. The three departments, while separate and coordinate, are each necessarily subject to the due exercise of the power possessed by the others. Hence, if Congress may make the law for the separate and coordinate branches represented by the executive and the judicial departments of the Government, it may make the law for itself, so long as it does not overstep the constitutional bounds or change constitutional methods.

Statutes forbidding members of the legislature from receiving bribes exist in most, if not all, of the States. The constitutional provisions of Maine, Connecticut, New Jersey, Virginia, Indiana, Iowa, and California in regard to the qualifications of members, their privilege from arrest, and the power of each house to compel the attendance of absent members or expel them, are substantially the same as those of the Federal Constitution. The statutes of those States also provide fine and imprisonment and disqualification from thereafter holding any office or public trust. (Maine, Rev. Stat. 1902, c. 123, sec. 5; Connecticut, Gen. Stat. 1902, sec. 1260; New Jersey, Gen. Stat., sec. 24, p. 1054; Virginia, Code 1904, sec. 3745; Indiana, Rev. Stat. 1897, sec. 2122; Iowa, McClain's Anno. Stat. 1884, Title XXIV, chap. 6, secs. 3940, 3941; California, Penal Code 1897, sec. 86.) The statutes of Maine, Connecticut, Virginia, and California expressly declare that the office of the member shall be forfeited.

The power of Congress to regulate the salary of its members is unquestioned. Sections 1781 and 1782 in effect merely forbid the receipt of any other compensation than that allowed them by law.

What constitutional provision prevents Congress from making it a crime for any judge of this or any other court of the United States to receive a valuable consideration for his vote or action in any case brought before him in his official capacity? What constitutional right of the judiciary would be interfered with in such a case? And if it may thus regulate the official

action of members of a coordinate branch of the Government, why can not it so regulate the official action of its own members?

It will not be denied that Congress may regulate the official conduct of the minor officers and employees of the Government. But it is contended that it is powerless to protect the nation from those high in office, who, because of their great power and influence, are most to be feared. It will be observed that in the *Curtis* case this court evidently considered that all officers of the Government were in the same class in this respect, and none beyond the reach of the law.

Statutes of this kind in no way interfere with the constitutional rights and duties of members of Congress or the control of their respective Houses over them. Their sole object and effect is to promote the public welfare by insuring honest and legitimate service in all branches of the Government.

Respectfully submitted.

CHARLES H. ROBB,
Assistant Attorney-General.

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